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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 354

WALTER ALLE et al.,
Petitioners,

v.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Claims.

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OCTOBER TERM, 1959.

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1. Allen, Walter
2. Baker, Anthony
3. Barber, L.
4. Bires, Elmer
5. Blackwell, Charles
6. Blackwell, Archie R.
7. Cook, Leland
8. Daniels, Wilbert
9. Douglas, Leslie J.
10. Fairchild, Ollie
11. Fletcher, Carl
12. Floyd, Harry E.
13. Gigers, Lonnie
14. Gill, Robert.
15. Glynn, J. M.
16. Hunt, Nick, Dec'd, by Nora Bland (Hunt), His Widow
17. Johnson, Julius
18. King, Wm., Dec'd, by Gertrude King, His Widow
19. Kynard, Bonnett
20. Lee, Oscar
21. McDonald, A. L.
22. McDonald, J. O.
23. McMoore, Isom
24. McPherson, E. L.
25. Moppin, Pearl
26. Neal, Curtis
27. Newland, George, Dec'd, by Dallie Newland, His Widow
28. Parker, Ben
29. Pennington, Cassie
30. Perkins, Frank
31. Pettis, R. L., Dec'd, by Annette C. Pettis, His Widow
32. Pettis, R. S.
33. Reed, N.
34. Richie, J.
35. Saunders, Eddie
36. Saville, Ira, Dec'd, by Pearl Saville, His Widow
37. Scott, J. E.
38. Shropshire, Bruce, Dec'd, by W. B. Shropshire, His Widow
39. Thomas, Chester
40. Thomas, Commadore
41. Thompson, John
42. Wilson, H.
43. Wilson, Edward
44. Woods, J. B.
45. Wright, Theodore
46. Wynn, Rann
47. Williams, E. L., Dec'd, by Elia Williams, His Widow

Petitioners,

vs.

The United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Claims.

The above named petitioners pray for a Writ of Certiorari to review the judgment of the United States Court

of Claims rendered on the 3rd day of June, 1959, in Case No. 135-58 styled, Walter Allen et al, Plaintiffs, vs. The United States, Defendant.

OPINION OF COURT OF CLAIMS.

Walter Allen et al. vs. The United States is not yet officially reported.

A copy of said opinion is appended hereto in the Appendix, and appears in the official Record filed herewith (R. 123).

JURISDICTION.

The decision of the United States Court of Claims was rendered and entered on the 3rd day of June 1959. Jurisdiction of this court to review said judgment is invoked under Title 28, U. S. C., § 1255 (1).

QUESTIONS PRESENTED.

1. Questions of discrimination by Government between negroes and whites solely because of race are involved.

2. Did the United States, through its Judicial Branch of Government, judicially enforce a discriminatory practice against these negroes solely because they are negroes, contrary to the decisions of this Court in Shelly v. Kraemer (1948), 334 U. S. 1; Hurd v. Hodge (1948), 334 U. S. 24; Brown v. Bd. Education (1954), 347 U. S. 483, and Bolling v. Sharpe (1954), 347 U. S. 497?

3. Is a railroad, all of whose properties and assets are under the custody, control, and jurisdiction, of the Judicial Branch of the Government, through a United States District Court appointed Trustee (who operates said railroad completely and totally for twenty-three years), being

operated by the United States of America, so as to charge the Federal Government with liability for back wages claimed to be due petitioners by reason of wage discriminations practiced upon them by the trustee, the court, and the Judicial Branch of Government?

4. May the Judicial Branch of the Federal Government, in the operation of a railroad for twenty-three years through its Trustee, discriminate in wages between negro employees and white employees, solely because of race?

5. Where negro trainmen perform the same duties as white trainmen in head end braking, and other duties in addition thereto such as assisting passengers on and off trains, not performed by white trainmen, on a railroad, all of whose properties and assets are under the complete custody, control, and jurisdiction of the Judicial Branch of Government, may the Judicial Branch of Government, acting through its agent, its trustee and officer of the court, discriminate against such negro employees in the payment of wages to them, by paying such negro employees substantially less wages than paid to white employees, solely and exclusively because they are negroes?

6. Where such discrimination has been practiced by the Judicial Branch of Government, does the Federal Government become liable to such negroes for the difference in wages between what they were paid and what they should have been paid had there been no discrimination against them?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitutional Provisions and Statutes involved in this case are as follows:

1. Fifth Amendment to the Constitution of the United States (U. S. C. A., Const. Amend. 1 to 13, page 102).

2. Section 1 of Fourteenth Amendment of the Constitution of the United States (U. S. C. A., Const. Amend. 14 to end page 2).

3. Declaration of Independence of the United States (U. S. C. A., Const., Art. 1, § 1-9, page 7).

4. Title 8, United States Code, Sections 42 and 43 (R. S. 1977 and 1978).

5. Article I, Section 2, of the Constitution of the State of Missouri (Volume 1, Revised Statutes of Missouri 1949, page 41).

6. Article II, Section 3, of the Constitution of the State of Arkansas (Vol. 1; Ark. Statutes 1874 annotated, page 26)

7. Title 49, United States Code, Section 3, paragraph 1 (49 U. S. C. A., § 3, par. (1), page 219).

Pertinent extracts are set out verbatim in Appendix.

STATEMENT:

Each of the petitioners is a negro citizen of the United States. Each has worked as a trainman, engaged in head-end braking on trains of the Missouri Pacific Railroad, at some time between June 22, 1933, and October 15, 1956. Each claims back wages from the United States in various amounts (R. 1).

During said period the Missouri Pacific Railroad was under the complete custody and control of, and was being operated by, the Judicial Branch of the Government of the United States through a Court-appointed Trustee in Reorganization. Prior to, during, and since said period, petitioners performed all of the duties performed by white trainmen on said railroad (and even more), but because they are negroes, were paid a wage much less than that paid white trainmen.

On March 31, 1933, the Missouri Pacific Railroad Company petitioned the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, to take possession, custody, and control of all of its properties and assets, appoint Trustees, and effect a plan of reorganization pursuant to law. On said date the court approved the petition, and on June 22, 1933, appointed Trustees of all the property and assets of said railroad. The Judicial Branch of Government, through its Trustee, thereafter operated said railroad absolutely and in full until October 15, 1956 (a period of twenty-three years), at which time it was returned to its private owners.

During all of the time petitioners had worked on said railroad (during said period from June 22, 1933, to October 15, 1956, prior thereto, and subsequent thereto), they were required to, and did, perform all of the duties and functions of a headend brakeman, such as to assist in the operation of the train, receive and transmit orders to the

conductor, engineer and fireman, throw switches, flag trains, and pass periodic examination on rules, the same duties as were required of white headend brakemen, and, in addition thereto, were also required to perform the duties of assisting passengers to board and alight from trains, and keep the cars, steps, and other facilities clean and free from accumulation of dirt and debris, which additional duties the white headend brakemen did not perform.

During all of the time petitioners had worked on said railroad and performed the aforesaid duties, they received pay materially less than the white headend brakemen, except during the period from December 2, 1918, to February 1, 1921, when they received the same pay as the white headend brakemen. During this latter period the Missouri Pacific Railroad was operated by the Executive Branch of the Government. The Director General of Railroads, Mr. William G. McAdoo, upon taking office, issued an order equalizing the pay of petitioners (and other negroes who performed headend brakemen duties) with that of white headend brakemen.

On February 1, 1921, after the Missouri Pacific Railroad had been returned to its private owners, the wages of petitioners (and other negroes who performed headend brakemen duties), were reduced below that of white headend brakemen, but their duties remained unchanged. About this time, the Missouri Pacific Railroad Co. and the Brotherhood of Railroad Trainmen, which organization contained no negro members, entered into an agreement, under which negroes would not hold jobs as brakemen and white men would not hold jobs as porters on passenger trains, and negroes would be taken off the trainmen's seniority list and would give up their freight runs. Thereafter petitioners were required to work under the designation of "Train Porters" and to receive less pay than white trainmen (headend brakemen), although petitioners continued to perform the same duties.

This condition of discrimination in pay existed throughout the period of judicial operation from June 22, 1933, to October 15, 1956. In 1936, 1939, 1941 and 1945 the wage rates of petitioners and white trainmen were changed from time to time, and in each such change the increase received by petitioners was always less than the increase received by the white brakemen, and such discrimination in wages between negro brakemen and white brakemen continued. Each such wage change and discrimination was negotiated by the Court's trustee and was approved by the court; the Judicial Branch of Government.

Such discrimination in wages was solely on account of the race and color of petitioners.

Prior to this court's decision on June 9, 1952, in the case of Brotherhood of Railroad Trainmen v. Simon L. Howard and St. Louis-San Francisco Railway Co., 343 U. S. 768, 96 L. Ed. 1283 (directing injunctive relief to protect negro railroad employees from loss of jobs), negroes performing brakeman duties on the railroads were not afforded any realistic security against the loss of their jobs for the sole reason that they were negroes.

On October 19, 1955, petitioner Cassie S. Pennington, having reached retirement age and no longer fearing loss of his job, filed his petition and his claim, for himself and others similarly situated, against the Trustee of the Missouri Pacific Railroad in the United States District Court in St. Louis, Missouri (Case No. 6935), seeking the recovery of $16,800.00 of back wages due him by reason of the aforesaid discriminations. On March 30, 1956, said application to intervene was denied. In due course an appeal from such denial was prosecuted to the United States Court of Appeals for the Eighth Circuit. On December 21, 1956, said court sustained the District Court and affirmed the denial of said petition for intervention (Pennington v. Mo. Pac. R. R. Co., 239 F. 2d 332).

On March 28, 1958, petitioners filed their petition in the United States Court of Claims (R. 1) seeking recovery from the United States of said back wages, on the theory that said railroad had for twenty-three years been operated by the United States through its Judicial Branch of Government, and such discrimination in wages constituted a taking of petitioners' property by the Judicial Branch of Government contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States; the Declaration of Independence, the Statutes and case law of the United States, and fundamental principles of equality and justice. Jurisdiction of said Court was invoked pursuant to Section 1491 of Title 28, United States Code, which provides:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> (1) Founded upon the Constitution; or
>
> (2) Founded upon any Act of Congress; or
>
> (3) Founded upon any regulation of an executive department; or
>
> (4) Founded upon any express or implied contract with the United States; or
>
> (5) For liquidated or unliquidated damages in cases not sounding in tort."

There is ample case law also supporting the jurisdiction of the Court of Claims. Clapp v. U. S. (Court of Claims 1954), 117 F. Supp. 576; Christie Street Commission Co. v. U. S., 136 F. 326; Compagnie Generale Transatlantique v. U. S., 21 F. 2d 465; Foster v. U. S., 98 F. Supp. 349; U. S. v. Colby, 328 U. S. 256.

Petitioners contended in the Court of Claims that during said period from June 22, 1933, to October 15, 1956, the Missouri Pacific Railroad was being operated by the

United States Government through its Judicial Branch of Government comparable to the period from December 2, 1918, to February 1, 1921, when the said railroad was being operated by the United States Government through its Executive Branch of Government; that it was the duty of the Judicial Branch through its trustee to pay petitioners a wage equal to that paid the white trainmen for the same work and not to discriminate against them merely on account of their color and race; that when the Judicial Branch failed to do so and actively furthered the wage discrimination then it (the Federal Government) became liable to petitioners for such difference in wages for the period during which the railroad was being operated by the Government.

The Government filed its motion for summary judgment and brief in support thereof (R. 19) stating that "there is no genuine issue of material fact, and as a matter of law defendant is entitled to judgment dismissing plaintiff's petition." Petitioners filed their brief in opposition (R. 75). On May 4, 1959, said motion was orally argued before the court (R. 121).

On June 3, 1959, the United States Court of Claims sustained the defendant's motion and dismissed petitioners' petition. In its opinion (R. 123) the court stated, among other things:

> "The Plaintiffs allege that the practice of paying negro brakemen less than white brakemen, and of requiring negro brakemen to perform porters' duties in addition to brakemen's duties, was 'unjust and discriminatory.' That much would seem to be obvious."

The court, however, did not rule on whether such discrimination was in fact contrary to law and the Constitution; it did not rule on whether the Missouri Pacific Railroad was in fact being operated by the Federal Government; it did not rule on other important questions of Federal law

raised by the parties. The court, while finding in effect that petitioners had been discriminated against, decided against petitioners apparently on the ground that petitioners "could" have made complaint to the District Court.

> (Opinion) "If the alleged discriminatory practice was illegal it would seem that a complaint could have been made to the court, which could have required the trustees to operate the railroad in all respects in conformity with the law."

which, "so far as appears, no such complaint had been made."[1] The court thus did not base its decision on any matter of jurisdiction, substance, or law, but only on such vague "extra legal" ground, that if some other court "could" have heard a case—then let that other court hear it.

REASONS FOR ALLOWANCE OF CERTIORARI.

This Honorable Court should grant this Writ of Certiorari for the following reasons:

1. Important and fundamental constitutional questions of the basic equality of negroes and whites are involved, and the right of negroes not to be economically discriminated against by Government.

2. The question of whether or not the United States Government, acting through its Judicial Branch, actually operated the Missouri Pacific Railroad for 23 years during its Trusteeship in reorganization in such a manner so as to become liable to these peti-

[1] That petitioners were refused the right to intervene in the Missouri Pacific Reorganization proceedings by the District Court and the Eighth Circuit Court of Appeals does not appear in the petition, nor in petitioners' brief to the Court of Claims. But in oral argument the court inquired on this point and was fully advised of such proceeding and its result.

tioners for unpaid back wages, has never been before this court and is a new and important question of Federal law that ought to be decided.

3. Ours is a government of three independent co-equal branches. The Constitution applies with equal force to all. The question of whether or not the Judicial Branch of Government should have equalized petitioners' wages with that of white trainmen as did the Executive Branch of Government when it operated the Missouri Pacific Railroad from December 2, 1918, to February 1, 1921, has never been before this court and is a new and important question of Federal law that ought to be decided.

4. The Court of Claims decision, in admitting that negro petitioners were discriminated against, yet ruling against them, has rendered a decision in conflict with the trend of decisions of this Court in the field of civil rights, anti-discrimination and equality.

5. The decision of the Court of Claims is contrary to the principles enunciated by this court in Shelly v. Kraemer (1948), 334 U. S. 1; Hurd v. Hodge (1948), 334 U. S. 24; Brown v. Board of Education (1954), 347 U. S. 483; and Bolling v. Sharpe (1954), 347 U. S. 497, and is based on erroneous and unsound reasoning.

6. The application of the Fifth and Fourteenth Amendments to the Constitution of the United States, as they apply to this question of wage discrimination against negro trainmen by an operating Trustee in a railroad reorganization, needs further interpretation by this Court.

ARGUMENT.

I.

In the recent Arkansas School integration case of Cooper v. Aaron (1958), 78 S. Ct. 1401, Mr. Chief Justice Warren declared that "The Constitution created a government dedicated to equal justice under law." That is precisely what these petitioners are seeking.

For at least twenty-three years during the operation of the Missouri Pacific Railroad by the Judicial Branch of the Federal Government, these petitioners have been performing all of the duties of headend braking that white trainmen perform (and even more), but have been paid substantially less wages than their white brethren for the sole reason that they are negroes. This same condition existed in 1918 when the Missouri Pacific Railroad was taken over and operated by the Executive Branch of Government. At that time the Director General of Railroads, Mr. William G. McAdoo, corrected such discrimination at once, and equalized their pay. Not to do so would have contravened the Fifth Amendment to the Constitution. This condition of wage discrimination also existed in 1933 when the Missouri Pacific Railroad came under the jurisdiction of the Judicial Branch of Government. The Judicial Branch should have at once equalized the pay of petitioners with white trainmen but didn't. Such discriminations were sanctioned, and further wage discriminations were perpetrated by negotiating and approving discriminatory wage contracts in 1936, 1939, 1941 and 1945.

The same Constitution that "created a Government dedicated to equal justice under the law" also created a Government of three independent and co-equal branches. Humphrey's Executors v. U. S. (1935), 295 U. S. 602. The same law of the land that required the Executive Branch

of Government to equalize the pay of negro and white in 1918 ought to require the Judicial Branch to do likewise in 1933.

It contravenes the Constitution for the government, whatever Branch may act, to discriminate or to aid in such discrimination among people, because of color (although sadly enough private persons may do so with impunity). Shelly v. Kraemer, 334 U. S. 1.

The United States is responsible for such discrimination in wage to these petitioners, and, to the extent of the difference in pay between the amount petitioners were paid and the amount petitioners should have been paid from June 22, 1933, to October 15, 1956, the United States has taken petitioners' property without due process of law in violation of the Fifth Amendment of the Constitution.

There is no requirement in law that the form and manner of operation of the Missouri Pacific Railroad by the Executive Department from 1918 to 1921, and the form and manner of operation of the Missouri Pacific Railroad by the Judicial Department from 1933 to 1956, be the same or be in the same manner. Each of the three great Departments are independent of the other and are equal. One Department may perform acts in one way and the other Department may perform the same acts in another way, as long as each acts within the framework of the Constitution and the statutes of Congress.

II.

The Federal Government, through its Judicial Branch, did actually operate the Missouri Pacific Railroad between 1933 and 1956 and actually had a greater, more all inclusive custody, possession and control of the Railroad than did the Executive Branch from 1918 to 1921. In Re: Federal Facilities Realty Trust (7th Cir., 1955), 220 F. 2d 495.

Section 77 of the Bankruptcy Act (U. S. Code, Title 11, Chap. 8, § 205) gives the Court "exclusive jurisdiction of the Debtor and its property wheryever located," and provides that the Court "shall have and may exercise in addition to the powers conferred by this section, all the powers not inconsistent with this section which a Federal Court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

The Bankruptcy Act was passed pursuant to Article I, Section 8 of the Constitution.

Pursuant to such authority in the law, the Judicial Branch of Government took over the possession, custody, and control of the Missouri Pacific Railroad and appointed trustees,

> ". . . of all and singular the railroads, lands, properties, estates, and franchises, of whatever character, and wherever situated of Missouri Pacific Railroad Co.: . . ."

and the Judicial Branch through its Judge proceeded to order its trustees:

> ". . . to operate and maintain the railroads and property of the Debtor (Mo. Pac.) wherever situated and to manage and conduct its business, and to exercise general and specific powers, **according to law**[1] and **subject to such supervision and control by the court** as the court might exercise by further orders entered herein." (Emphasis mine.)

On July 25, 1933, in the process of the Judicial Branch of Government taking possession, control, and custody of the Missouri Pacific Railroad through its trustees, it was provided:

[1] The Bankruptcy power, like the other great powers of Government, and the action of the Court and its trustees is subject to the 5th Amendment. Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555; Kuehner v. Irving Trust Co., 299 U. S. 445.

"And said Trustees shall have all the title and be subject to the control of the Court and, consistently with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy, shall exercise all of the powers of trustees appointed pursuant to Section 44 or any other section of the Act of Congress relating to bankruptcy."

"And the Court reserves full right and jurisdiction to make, from time to time, such other and further orders as the Court shall deem proper, amplifying, extending, limiting or otherwise modifying such orders of June 22, 1933, temporarily appointing said Trustees, and said orders of June 30, 1933, and July 1, 1933, and, in all respect, to regulate and control the conduct of said Trustees."

The Trustee in operating Missouri Pacific had little, if any, discretionary power. It was thus all in the court. Amid the myriad of other things for which he required court approval, he had to obtain court approval to buy equipment, abandon property, sell real estate, build stations, approve contracts, **fix wages, approve labor contracts,** employ accountants, employ attorneys, bring actions before the I. C. C. and even to compromise certain claims. In fact, in all important matters the trustee can act only with the approval of the court and the trustee must keep the court frequently and fully advised. Imperial Assurance Co. v. Livingston (8th Cir., 1931), 49 F. 2d 745, 748.

This is in fact the complete operation of the Missouri Pacific Railroad by the Judicial Branch of Government and the Judicial Branch may not discriminate against these petitioners because of their color or race. Having operated the railroad and having discriminated against petitioners by paying them less wages than they should have been paid, the Federal Government is liable for the consequences of its discrimination to these petitioners.

It was within the power and jurisdiction of the Trustee with the approval of the court, and indeed it was their duty under the law to equalize the wages of petitioners with those of the white brakemen.

It is submitted that this is an important Federal question that has not previously been before the courts and ought to be decided.

III.

The Court of Claims in its decision recognizes and concedes that the discrimination in wages paid the negro brakemen existed and was unjust and discriminatory. Nonetheless it denies petitioners recovery apparently on the ground that petitioners could have proceeded through the District Court. This is no legal ground for denying petitioners relief. The fact is that petitioners did so proceed and were denied relief by the District Court.

The Court of Claims decision is in direct conflict with the doctrine of Shelly v. Kraemer, 334 U. S. 1; Hurd v. Hodge, 334 U. S. 24; Brown v. Bd. of Ed., 347 U. S. 483, and Bolling v. Sharpe, 347 U. S. 497. The Court of Claims states that:

> "The doctrine of those cases (referring to Shelly v. Kraemer) is that the States and the Federal Government, through their judicial branches, will not become *particeps* to a racial discrimination, by judicially enforcing a discriminatory agreement between private persons. We have no such situation here. The United States did not own the railroad, nor employ the plaintiffs. It merely made available to a railroad in financial distress a judicial proceeding which might lead to a rational reorganization. Because of the court's supervisory powers, relief from illegal employment practices would seem to have been more easily available than in the normal situation.

> But the court did not become a policeman on a beat, charged with the duty of detecting violations of which no complaint was made. The United States did not, through its judicial branch, enforce a discriminatory practice against the plaintiffs."

It is submitted that the United States did not have to own the railroad in order to be liable for the admitted discrimination to petitioners. It is sufficient that it operated the railroad for twenty-three years through its Judicial Branch, and knowingly permitted the discrimination to exist, and actively participated in the discrimination, while under its jurisdiction. The Executive Branch did not "own" the railroad in 1918 to 1921 but only operated it.[1]

The United States did in fact employ petitioners through its trustee. At best a railroad is never a private employer; it is a public corporation. How much more so is it public when for 23 years it is operated by the Judicial Branch of Government. The trustee is an agent and officer of that department and has at his command the entire majestic power of Government in operating said railroad.

And the court did in fact "become a policeman on a beat charged with the duty of detecting violations . . . ." whether complaint was made of them or not. A private person is presumed to know the law and is charged with responsibility for its violations. How much more so the courts? Since when is Government above the law—and

[1] In the 1918 taking there was no public ownership. There was only a taking of possession. The Statute said, 40 Stat. 1733, 34, "Now, Therefore, I—Woodrow Wilson, President of the United States . . . take possession and assume control . . . ." this is no different than the court appointing Trustees to "run, manage, maintain, and operate the railroad and its properties." The only difference is that one was an operation by the Executive Branch of Government and the other was an operation by the Judicial Branch of Government. Neither could act except for an Act of Congress. Both acted pursuant to an act of Congress. Both were bound by the Constitution.

particularly the courts and the Judicial Branch? It was not even necessary, in any case, for the court to "become a policeman on a beat charged with the duty of detecting violations . . . ." for the further reason that the court's trustee in 1936, 1939, 1941, and again in 1945 negotiated wage agreements continuing such wage discriminations and such wage agreements were approved by the court itself. The Judicial Branch of Government thus clearly knew of these discriminations and did not have to be a "policeman on a beat." It actively participated in the discrimination.

The reasoning of the Court of Claims is thus erroneous and fallacious when it says "the United States did not, through its Judicial Branch, enforce a discriminatory practice against the plaintiff." The doctrine of Shelly v. Kraemer, 334 U. S. 1, and such other cases clearly applies and in this respect the decision of the Court of Claims is clearly wrong and contrary to law.

IV.

While the equal protection of the law guaranteed by the Fourteenth Amendment to petitioners applies only to the states, the courts have come around to the reasoning that the denial of such equal protection by the Federal Government constitutes a taking of property without due process of law and violates the Fifth Amendment of the Constitution which Amendment applies to the Federal Government. Shelly v. Kraemer (1948), 334 U. S. 1; Hurd v. Hodge (1948), 334 U. S. 24, and Cooper v. Aaron (1958), 78 Sup. Ct. 140, certainly establish this and even more.

Shelly v. Kraemer (1948), 334 U. S. 1, is a case which arose in St. Louis, Missouri, wherein the court was asked to enforce a private restrictive agreement among property owners, the purpose of which was to exclude negroes from owning real property. The Supreme Court of Missouri

had sustained the validity of such agreements and the Supreme Court of the United States granted certiorari. Mr. Chief Justice Vinson wrote the opinion for the court and at page 14 thereof he said:

> "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this court."

and at page 15 the court says:

> "similar expressions giving specific recognition to the fact that judicial action is to be regarded as action of the state for purposes of the Fourteenth Amendment are to be found in numerous cases."

In Twining v. N. J. (1908), 211 U. S. 78, 90-91, Mr. Justice Moody states:

> "the judicial act of the highest court of the state, in authoritatively construing and enforcing its laws is the act of the state."

In Brinkerhoff Faris Co. v. Hill (1930), 281 U. S. 673, 680, Mr. Justice Brandeis declared that:

> "The Federal guarantee of due process extends to state action through its legislative, executive, or administrative branches of government."

In Mooney v. Holohan (1935), 294 U. S. 103, 112-13, the Supreme Court declared:

> "And the action of prosecuting officers on behalf of the state, like that of administrative officer in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment."

In the Civil Rights cases (1883), 109 U. S. 3, 11, 17, the court declares that the Fourteenth Amendment makes void "state action of every kind" which is inconsistent

with the guarantees contained in the amendment and "extends to manifestations of state authority in the shape of laws, customs, or judicial or executive proceedings."

In Home Tel. & Tel. Co. v. Los Angeles (1912), 227 U. S. 278, 286, the court declares:

> "By this construction the reach of the Amendment is shown to be co-extensive with any exercise by a state of power in whatever form exerted."

While I have been unable to find any decisions that squarely say that the action of a Federal Court or its Judicial officers in their official capacity is action of the Federal Government within the meaning of the Fifth Amendment, how could it be otherwise? Can it be the law that there is one legal and moral standard of equality for the states to live up to and a different and lesser standard for the Federal Government? Certainly not! Hurd v. Hodge (1948), 334 U. S. 24, 35. Since the United States Supreme Court has so firmly established the law that the action of state courts and judicial officers in their official capacity is the action of the state how could it consistently hold that the action of the Federal courts and their judicial officers in their official capacity is not action by the Federal Government within the meaning of the Fifth Amendment? Logically and consistently it cannot. Shelly v. Kraemer must therefore certainly apply to Federal courts and their judicial officers acting in their official capacities just as it applies to state courts and their judicial officers acting in their official capacities.

On the same day that Shelly v. Kraemer was decided the Supreme Court decided the companion case of Hurd v. Hodge (1948), 334 U. S. 24, which involved the validity of private restrictive agreements of the same kind by persons in the District of Columbia. Mr. Chief Justice Vinson delivered the opinion of the court and declared that since the restrictive covenants were prohibited by the

Civil Rights Act of 1866 that it was unnecessary to decide the questions on constitutional grounds. Nonetheless, the essence of this decision is that such restrictive covenants are contrary to the Fifth Amendment and **the public policy of equality in this government.** He states at page 31:

> "We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute (Civil Rights Act of 1866) under consideration is directed is governmental action."

And, at page 33, he further states:

> "Moreover, the explicit language employed by Congress to effectuate its purposes leaves no doubt that judicial enforcement of the restrictive covenants by the courts of the District of Columbia is prohibited by the Civil Rights Act."

At page 34 Chief Justice Vinson re-enforces the Court's decision by the long established public policy of the United States. The court states:

> **"But even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants in these cases is Judicial action contrary to the public policy of the United States** and as such should be corrected by this court in the exercise of its supervisory powers over the courts of the District of Columbia. The power of the Federal Courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, Treaties, Federal statutes, and applicable legal precedents. Where the enforcement of private agreements

would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." (Emphasis mine.)

Even if the trustee were not an officer of the court, an agent of the judiciary, a judicial officer exercising the powers of "state," all of which in fact he is, and even if he were only a private person, his conduct and the conduct of the court in continuing the discrimination in wages against petitioners and in negotiating and approving discriminatory wage agreements in 1936, 1939, 1941 and 1945 was "contrary to the public policy of the United States." The United States District Court—the Judicial Branch of the Government—enforced this discrimination, continued it in full force and effect, and actively participated in it each time it negotiated and approved a new labor contract affecting petitioners. This is governmental action. This is action by the United States itself and in such action the United States took property of petitioners without due process of law contrary to the Fifth Amendment. That such labor contracts perpetuating wage differentials and discrimination against negro petitioners were approved by and negotiated with the help of some other governmental agency such as the Railway Labor Board, serves only to increase the amount of governmental action. Wherein can the Court of Claims decision that "the United States did not, through its Judicial Branch, enforce a discriminatory practice against the plaintiffs," be sustained? How clearly wrong and erroneous and contrary to law is its decision! Even if there were no governmental operation of Missouri Pacific by the Judicial Branch of Government during these years and the wage discrimination were considered as a private agreement between petitioners and the Railroad then the Trustee and the Court would be in the position of enforcing a private discriminatory agreement contrary to the Supreme Court's declaration in Shelly v. Kraemer and Hurd v. Hodge.

That the standard of equality between negro and white that the Constitution demands of the Federal Government is the equal of that demanded by the Fourteenth Amendment from the states is also declared by Chief Justice Vinson in this case at page 35 where the court declares:

> "We are here concerned with the action of Federal courts of such a nature that if taken by the courts of a state would violate the prohibitory provisions of the Fourteenth Amendment. Shelly v. Kraemer. It is not consistent with the public policy of the United States to permit Federal Courts in the Nation's capitol to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guarantee of the equal protection of the law. **We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory actions of federal courts than against such action taken by the courts of the states.**" (Emphasis mine.)

In Shelly v. Kraemer Chief Justice Vinson said "these are cases in which the states have made available to such individuals the full coercive power of government to deny to petitioners on the grounds of race or color the enjoyment of property rights in premises. . . . ." **Such is the case here. The full coercive power of the United States Judicial Department, in a case in which the District Court has complete, exclusive and absolute, possession of all the properties and assets of the Missouri Pacific Railroad, were made available to the court-appointed Trustee.**

In Brown v. Board of Education (1954), 347 U. S. 483, it was held that negroes by reason of segregation of school facilities were "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." Mr. Chief Justice Warren delivered the opinion of the Court.

On the same day the same Court speaking through the same Chief Justice in the case of Bolling et al. v. Sharpe (1954), 347 U. S. 497, declared:

> page 500 "... racial segregation in the schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution. ... In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools **it would be unthinkable that the same constitution would impose a lesser duty on the Federal Government.**" (Emphasis mine.)

The bridge between the equal protection clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment is complete. The state courts would not have been permitted to discriminate against petitioners in wages in a reorganization because to do so would be a denial of "the equal protection of the laws." Nonetheless the Judicial Branch of the United States Government, acting through a United States District Court, its Presidentially appointed Judge and such Court's appointed Trustee, did discriminate against petitioners in wages and did deny to petitioners the equal protection of the law. The principles of Shelly v. Kraemer, Hurd v. Hodge, Brown v. Bd. of Education, Bolling v. Sharpe, Cooper v. Aaron all apply.—"... it would be unthinkable that the same constitution would impose a lesser duty on the Federal Government"—The discrimination against petitioners practiced by the Federal Court and its Trustee in wages is a taking of property without due process of law contrary to the Fifth Amendment. The United States Judicial Branch of Government did this from June 22, 1933, to October 15, 1956, and such money should be returned to petitioners. It is never too late for the Government to correct a wrong done its citizens.

The judgment of the Court of Claims is clearly wrong and should be corrected.

V.

Even more so is the opinion of the Court of Claims erroneous. The Court declared:

> "It may well be that the alleged discriminatory practice of the railroad while it was in private management between 1921 and 1933 was, if it occurred, a violation of law. See Steele v. L. & N. R. Co., 323 U. S. 192. If so, the 'trainporters' had the same access to the courts that the complainant had in Steele."

Paragraphs 33 to 36 of petitioners' petition in the Court of Claims sets out in great detail the fear of losing their jobs under which petitioners worked. It was not until 1952 that this court in the case of Brotherhood of Railroad Trainmen v. Simon L. Howard and St. Louis San Francisco Railway Co., 343 U. S. 768, 96 L. Ed. 1283, granted petitioners any realistic job security. These paragraphs are admitted by the defendant for the purpose of its motion. The Court of Claims must consider them to be true in ruling such motion. Petitioners, therefore, did not have the same **practical** access to the courts that complainants had in the Steele case. Any such action would have cost petitioners their jobs. Such was also true in the recent case of Cook et al. v. Brotherhood of Sleeping Car Porters et al. (a case involving negro employees of Missouri Pacific Railroad Co.), 309 S. W. 2d 579 (1958). Certiorari denied by Supreme Court in Case No. 1059 (1959).

An examination of the Steele case, however, is valuable for these petitioners. Steele v. L. & N. R. Co. (1944), 323 U. S. 192. In that case, the Supreme Court had before it questions concerning discrimination against negroes practiced by the Brotherhood of Locomotive Firemen and Engineers, the results of which were to displace negroes with whites in certain jobs and in other ways to discriminate against them. The Court ruled that Congress in passing the Railway Labor Act and authorizing a labor union to

represent the employees did not intend to confer on the union representative power to discriminate against the negro employees. Can it be said that Congress in enacting the Bankruptcy Act intended for the Court and its Trustee to discriminate against these petitioners? Certainly not! In this case it was held that discriminations because of race or color in the areas of governmental action were based on irrelevant and invidious distinctions and were stricken down as violating public policy, the Federal Civil Rights Act, and the due process clause of the Fifth and Fourteenth Amendments, dependent on whether the action was federal or state. In his concurring opinion in the case, Mr. Justice Murphy said (l. c. 208):

> "The economic discrimination against Negroes practiced against Negroes by the Brotherhood and the Railroad under color of Congressional authority raises a grave constitutional issue that should be squarely faced."

It is respectfully submitted that the economic discrimination against petitioners practiced by the Trustee, the Court and the Judicial Branch of Government is one also that should be squarely faced on its merits and not sidetracked by way of sustaining a motion for summary judgment. At page 209 Mr. Justice Murphy continued:

> "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation."

Certainly the operation of the Missouri Pacific Railroad by the Judicial Branch of the United States Government through the United States District Court is in the area of

governmental action. Certainly the Trustee's economic discrimination against the petitioners was under the authority of law, since the Trustee was operating under and by virtue of the Court's constitutional and statutory authority. Under the reasoning of the cases of Hurd v. Hodge, supra, and Steele v. L. & N. R. Co., supra, the Trustee's economic discrimination against petitioners placed the Court in the position of doing by indirection what it neither would nor could do by direction. The Trustee, under the supervision of the Court, should have followed the precedent set by the Executive Department by William G. McAdoo, Director General of Railroads, in his order of December 2, 1918, in which he equalized the pay of "train porters" with that of white brakemen, and in which action he refused to give governmental sanction to economic discrimination because of race, creed or color. While the three Departments of Government are independent, they are nonetheless equal and each is subject to the constitution itself.

The petitioners have been discriminated against by the Judicial Branch of their Government. In Bolling v. Sharpe (1954), 347 U. S. 497, 499, the Supreme Court said:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. . . . But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. . . ."

In his concurring opinion in Steele v. L. & N. R. Co. (1944), 323 U. S. 192, 208, a case wherein job and other economic discriminations were practiced against the negroes by the Railroad and the Brotherhood of Locomotive Engineers, Mr. Justice Murphy declared:

p. 208 "The utter disregard for the dignity and the well being of colored citizens shown by the record is

so pronounced as to demand the invocation of constitutional condemnation. **To decide the case and to analyze the statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees is to make the judicial function something less than it should be.**" (Emphasis mine.)

It is respectfully submitted that the Court of Claims' decision is erroneous and contrary to law. Petitioners' petition should not have been dismissed. A Writ of Certiorari is respectfully prayed.

Respectfully submitted,

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APPENDIX.

Opinion of Court of Claims.

In the United States Court of Claims.

No. 135-58.

(Decided June 3, 1959.)

Walter Allen, et al. v. The United States.

Mr. Bernard Susman for the plaintiffs.

Miss Kathryn H. Baldwin, with whom was Mr. Assistant Attorney General George Cochran Doub, for the defendant.

On Defendant's Motion for Summary Judgment.

Per Curiam: This suit is brought by, or on behalf of the estates of, 46 persons, herein referred to as the plaintiffs, who at some time between June 22, 1933, and October 15, 1956, worked as trainmen on the Missouri Pacific Railroad. During that period the railroad was operated by trustees appointed by, and under the supervision and control of, the District Court of the United States for the Eastern District of Missouri. The reason for the trusteeship under judicial supervision was that the railroad was going through the process of reorganization of its capital structure pursuant to the provisions of section 77 of Chapter VIII of the Bankruptcy Act, 47 Stat. 1474, 11 U. S. C. § 205.

The plaintiffs were Negroes. During their employment with the railroad they were known as "train porters" which was a classification applied exclusively to Negroes. As "train porters" they assisted passengers with their

baggage, and performed other tasks. But in addition to those tasks, they performed all of the function of "brakemen" on passenger trains. They were not, however, paid the wages which white men who worked as brakemen on passenger trains were paid.

During World War I, while the railroads were administered by the Government through the agency of a Director General of Railroads, men who did the kind of work which the plaintiffs did were classified as brakemen, or porter-brakemen, and received brakemen's pay. The railroads were returned to private management in 1921, and then the Missouri Pacific and the Brotherhood of Railroad Trainmen, a union which admitted no Negro members, entered into an agreement whereunder Negroes would not be employed as brakemen, and white men would not be employed as "train-porters" on passenger runs. Thereafter the plaintiffs worked as train porters, and as such received less pay than brakemen. This practice continued from 1921 until the railroad went into the trusteeship in 1933, and continued through the trusteeship until 1956, when the railroad was returned to the direct management of its owners. So far as we are advised, the practice still continues.

The plaintiffs allege that the practice of paying Negro brakemen less than white brakemen, and of requiring Negro brakemen to perform porters' duties in addition to brakemen's duties, was "unjust and discriminatory." That much would seem to be obvious. They further say that the practice was violative of the plaintiffs' Constitutional and statutory rights. In this proceeding they are suing the United States for the additional wages which, they say, they earned but were not paid because of the discriminatory practice.

The plaintiffs cannot recover. When a sovereign sets up courts for the adjudication of the rights of its citizens, it

makes available to its citizens an essential and useful service. It does not thereby undertake to right all wrongs out of the public treasury. It may well be that the alleged discriminatory practice of the railroad while it was in private management between 1921 and 1933 was, if it occurred a violation of law. See **Steele v. L. and N. R. Co.**, 323 U. S. 192. If so, the "trainporters" had the same access to the courts that the complainant had in **Steele.** During the period covered by the instant suit, the Missouri Pacific was operated by trustees appointed by and under the supervision of a District Court of the United States. If the alleged discriminatory practice was illegal, it would seem that a complaint could have been made to the court, which could have required the trustees to operate the railroad in all respects in conformity with the law. So far as appears, no such complaint had been made. If complaint had been made and the District Court had failed to properly protect the legal rights of the plaintiffs, appellate relief would have been available.

Instead of asserting their alleged rights in tribunals made available to them by the Government for that purpose, they sue the Government for money compensation for their asserted wrongs. They seek to stretch the doctrine of such cases as **Shelley v. Kraemer**, 334 U. S. 1, to make it fit their situation. The doctrine of those cases is that the States and the Federal Government, through their judicial branches, will not become *particeps* to a racial discrimination, by judicially enforcing a discriminatory agreement between private persons. We have no such situation here. The United States did not own the railroad, nor employ the plaintiffs. It merely made available to a railroad in financial distress a judicial proceeding which might lead to a rational reorganization. Because of the court's supervisory powers, relief from illegal employment practices would seem to have been more easily available than in the normal situation. But the court did

not become a policeman on a beat, charged with the duty of detecting violations of which no complaint was made. The United States did not, through its judicial branch, enforce a discriminatory practice against the plaintiffs. And if there had been, which there was not, any error or neglect of duty on the part of the court, the United States would not have become liable to compensate the victim of that error.

The plaintiffs' petition will be dismissed.

It is so ordered.

Constitutional Provisions—Statutes Involved.

Constitutional Provisions and Statutes involved in this case are:

1. Fifth Amendment to Constitution of the United States (U. S. C. A., Const. Amend. 1 to 13, page 102):

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Section 1 of the Fourteenth Amendment to the Constitution of the United States (U. S. C. A., Const. Amend. 14 to end, page 2):

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The Declaration of Independence of the United States (U. S. C. A., Const., Art. 1, § 1-9, page 7):

"We hold these truths to be self-evident, that all men are created equal. That they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. . . ."

4. Title 8, U. S. C., § 42 and 43 (R. S. 1977 and 1978):

(1977) "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

(1978) "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

5. Article I, Section 2 of the Constitution of the State of Missouri (Volume 1, R. S. Mo. 1949, page 41):

". . . all persons are created equal and are entitled to equal rights and opportunities under the law; . . ."

6. Article II, Section 3 of the Constitution of the State of Arkansas (Vol. 1; Ark. Statutes 1874, annotated, page 26):

"The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color, or previous condition."

7. Title 49, U. S. C. A., § 3, para. (1), page 219:

"(1) It shall be unlawful for any common carrier subject to the provision of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway transit point, region, district, territory or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; provided, however, that this paragraph shall not be construed to apply to discrimination, prejudices, or disadvantage to the traffic of any other carrier of whatever description."

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No. 354

In the Supreme Court of the United States

OCTOBER TERM, 1959

WALTER ALLEN, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 29) is not yet reported.

JURISDICTION

The final judgment of the Court of Claims was entered on June 3, 1959. The petition for a writ of certiorari was filed on August 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Petitioners, who are Negroes, assert that the Missouri Pacific Railroad from June 22, 1933, to October 15, 1956, by agreement with the Brotherhood of Railroad Trainmen, paid them less wages than were paid

to white employees doing the same work. The question presented is whether the United States is liable for the difference in pay, on the basis that a United States district court, having jurisdiction of the railroad as a debtor in reorganization proceedings during the noted period, failed to correct the discriminatory wage practice.

STATUTE INVOLVED

28 U.S.C. 1491, 62 Stat. 940, provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> (1) Founded upon the Constitution; or
>
> (2) Founded upon any Act of Congress; or
>
> (3) Founded upon any regulation of an executive department; or
>
> (4) Founded upon any express or implied contract with the United States; or
>
> (5) For liquidated or unliquidated damages in cases not sounding in tort.

STATEMENT

This case involves claims for wages by 47 Negro petitioners who complain of the same kind of racially discriminatory practice described in *Brotherhood of Railroad Trainmen, et al.* v. *Howard*, 343 U.S. 768, 770–771. Of the 47 petitioners, some are individuals, and some the estates of individuals, all of whom worked as trainmen on the Missouri Pacific Railroad at some time during the period June 22, 1933, and October 15, 1956 (Ct. Cl. Pet. 1).[1] During that

[1] "Ct. Cl. Pet." refers to the petition filed in the Court of Claims.

period, the railroad underwent reorganization proceedings under section 77 of Chapter VIII of the Bankruptcy Act, 47 Stat. 1474, 11 U.S.C. 205; and it was operated by trustees appointed by the District Court of the United States for the Eastern District of Missouri (Ct. Cl. Pet. 3; Deft. Ex. 3, p. 25).[2] That court authorized suits against the trustee for any cause of action accruing during the operation of the properties of the debtor under the court's jurisdiction (Deft. Ex. 2, p. 23).

Petitioners were "train-porters," a classification applied exclusively to Negroes. In addition to their duties as porters, they performed the functions of "brakemen" on passenger trains. They were paid less in wages, however, than white men who performed brakemen functions (Ct. Cl. Pet. 4, 5). From 1918 to 1921, when the railroads were administered by the Government's Director General of Railroads, all employees performing brakemen's duties were paid brakemen's pay (Ct. Cl. Pet. 4, 6); but upon the return of the railroads to private management in 1921, the Missouri Pacific Railroad and the Brotherhood of Railroad Trainmen, a union which did not admit Negro members, entered into certain agreements under which Negroes thereafter were not employed as brakemen, and white men were not employed as train-porters (Ct. Cl. Pet. 7-9). Since brakemen were paid at higher rates than train-porters, and since petitioners' duties continued to include their functions as brakemen, the wage rates were discriminatory.

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[2] "Deft. Ex." refers to the exhibits in the appendix to the respondent's brief in the Court of Claims.

Petitioners filed this action against the United States in the Court of Claims on March 31, 1958, claiming the differences between the amount they were paid and the amount paid to white employees. They alleged that the United States became liable for their wage demands by virtue of the fact that the "Judicial Branch of the Government * * * took custody and control of all of the properties and assets of said Railroad Company * * *" (Ct. Cl. Pet. 3); that from June 22, 1933 to October 15, 1956 "* * * all of the custody, control, operation, and affairs * * *" of the railroad were "exercised" by the Government which operated the railroad "* * * absolutely and in full" (Ct. Cl. Pet. 3); that "* * * Following the taking over of the custody, control and operation of this Railroad Company by the United States of America through its Judicial Branch of Government, Petitioners continued to receive materially less pay than that of white men * * *" (Ct. Cl. Pet. 5); that during the course of such custody, control and operation they were paid less than they should have been paid (Ct. Cl. Pet. 11); and that "The aforesaid discrimination by the United States of America through its Judicial Branch of Government * * *" (Ct. Cl. Pet. 13) was violative of the Fifth and Fourteenth Amendments to the Constitution of the United States (Ct. Cl. Pet. 12), the Declaration of Independence (Ct. Cl. Pet. 12), the provisions of 8 U.S.C. 42 and 43 (Ct. Cl. Pet. 13), the Constitutions of the States of Missouri and Arkansas (Ct. Cl. Pet. 13–14), and the provisions of 49 U.S.C. 3 (Ct. Cl. Pet. 14).

The United States moved for summary judgment, and the Court of Claims granted its motion on the basis that the United States had not through its judicial branch enforced discrimination against petitioners, who are not its employees, and it was not therefore liable to them (Pet. 29).

ARGUMENT

The court below was plainly correct in rejecting the wage claims asserted by petitioners against the United States. Further review of these claims is, we submit, unwarranted.

1. The short and conclusive answer to petitioners' arguments here is simply that their claims do not lie "against the United States." 28 U.S.C. 1491, *supra*, p. 2. Although their claims are for "wages" or "back pay", they do not and cannot assert that they are or were employees of the United States. No allegation is made that they fit the provisions of the Classification Act of 1949, 63 Stat. 954, 5 U.S.C. 1071, *et seq.*, which constitutes the authorized basis for employment in the Executive Branch of the United States. See 5 U.S.C. 43; 46 Stat. 817, 63 Stat. 972. And, contrary to petitioners' suggestion, there is no doubt that petitioners were not employees of either the Legislative or Judicial branches of the Government. Thus, they can have no direct claim for wages against the United States. It would appear that whatever wrong they suffered was effected by their employer, the Missouri

[1] In their petition in the Court of Claims, petitioners assert their "* * * employment * * * by the United States of America through its Judicial Branch of Government * * *". (Ct. Cl. Pet. 9, par. 19).

Pacific Railroad, against which alone they might make a direct claim for wages.

2. Moreover, analysis of the allegations of the petition in the Court of Claims, *supra*, p. 4, reflects that in the petition no blame was placed on the trustees or the reorganization court for the discriminatory practices, nor did it allege that the trustees or the court even knew of the practices. It merely asserted the discrimination and stated that it continued during the period of court control. Petitioners' brief in the Court of Claims, and their petition in this Court, go further and assert that the trustees, in negotiating labor contracts which continued discriminatory wages, and the court in approving such contracts, actively participated in the discrimination against them (Petitioner's Ct. Cls. Brief, pp. 23-24; Pet. 3, 7, 17), apparently on the basis that the trustees and the court knew of the discriminatory practices and continued them. But whatever the knowledge and activities of the trustees and the court were, petitioners cannot show that the United States has undertaken to assume liability in damages therefor.

In an attempt to do this, petitioners hark back to the World War I period when the United States took over the country's railroads and directly prescribed and paid more appropriate wages. They argue from this that the nature and quality of control of the debtor railroad by the reorganization court is such that the United States, which created the court, is liable here for the court's omission to correct and adjust the discriminatory practice of which they complain. To make their point, petitioners state that the control of the railroad debtor by such a court consti-

tutes "* * * a greater, more all inclusive custody, possession and control * * *" than the President exercised in taking over the railroads during the period from 1918 to 1921 (Pet. 13).

It is, of course, true that a reorganization court has whatever control it requires over the essentially fiscal affairs of a debtor to accomplish its statutory objectives. And it is possible that had this matter of wage discrimination been properly brought before the court it would have been adjusted within the framework of the overall reorganization of the debtor.[1] But the

[1] In July, 1933, the reorganization court by order authorized suits against the trustees for "any cause of action accruing during the operation of the property of any of the Debtors under the jurisdiction of this Court * * *." (Def. Ex. 2, p. 234.) Since the proceedings were brought under Section 77 of Chapter VIII of the Act of Congress relating to Bankruptcy, as amended, 47 Stat. 1467, 1474, Act of March 3, 1933, even without the order, the trustees were subject to suit "* * * with respect to any of their acts or transactions in carrying on business connected with * * *" the debtors' property. 28 U.S.C. 959(a).

One of these petitioners, Pennington, filed an application in the reorganization proceedings for leave to intervene and claim against the debtor and the trustee. The proposed intervention was in the nature of a class action for back wages based on the identical discriminatory practices alleged in this case (Pet. 7). Since the application was filed about the time when confirmation of a reorganization plan which had taken about 23 years to work out was imminent, and since the court's consummation order made adequate provision for litigation of these "* * * claims against the railroad directly with the railroad", the application was denied. *Pennington* v. *Missouri Pacific Railroad Company*, 239 F. 2d 332, 335 (C.A. 8, 1956). The Eighth Circuit, like the applicant himself, clearly regarded the claim as one "against the railroad", and the court noted that the claims could have been asserted "at any time during the Trustee's operation".

debtor and its estate, even though reached by suit or negotiation through the trustee, would still remain the sole source of funds for amelioration of the wrong. This underscores the critical point that, although a bankruptcy court has control of a corporate debtor's estate for a time, the ownership of the corporate entity and its assets remain in private hands. This was plainly not so during the Government's operation of the railroads in and after World War I.

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[1] The President of the United States took possession and control of the Missouri Pacific Railroad on December 28, 1917, pursuant to Proclamation of December 26, 1917, 40 Stat. 1733, under the Act of August 29, 1916, 39 Stat. 619, 645, and operated it through the Director General under the Federal Control Act (March 21, 1918), 40 Stat. 451. *Missouri Pacific Railroad Co., et al.* v. *Kaltenbach*, 256 U.S. 551, 556 (1921). The all-inclusive control of the railroads established by the President through the Director General under the comprehensive provisions of the aforementioned Acts and Proclamation was expressed by this Court in *Northern Pacific Railway Co.* v. *North Dakota*, 250 U.S. 135, 148 (1919): "Sole control, or administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period of control the private ownership theretofore existing". This Court there noted also that all of the earnings of the railroad were by the Act expressly made the property of the United States. *Id.*, p. 152; Section 12, Federal Control Act, 40 Stat. 457). The owner companies "* * * interest in and control over the systems were completely suspended." *Missouri Pacific Railroad Co., et al.* v. *Kaltenbach*, *supra*, at p. 557, and provision was made for the payment of just compensation for the taking of the properties. 40 Stat. 451-452. The identity between the railroad systems and the United States was complete. *Dahn* v. *Davis*, 258 U.S. 421. Moreover, the crux of the matter, so far as this case is concerned, is that Congress, in Section 10 of the Federal Control Act, 40 Stat. 456, waived the sovereign's immunity from suit and thereby assumed liability for suits for wages payable to railroad employees.

Thus, there is no real analogy between these two situations of railroad control so far as this case is concerned, and the railroad employer of petitioners was in no wise the subject of a "taking" by the United States; nor was it an agency or instrumentality of the United States during the reorganization proceedings. *Seaboard Cotton Mills v. United States*, 327 U.S. 536, 539. (1946). At no time between 1933 and 1956 did Congress appropriate any monies for its operations, or assume any liability, obligation, or responsibility for the payment of its debts.

3. It would also appear evident that liability against the United States can not be predicated upon the proper functioning of a court in its administration of justice respecting matters within its jurisdiction. *Cromelin v. United States*, 177 F. 2d 275 (C.A. 5, 1949), certiorari denied, 339 U.S. 944, is clear as to this. There, liability of the United States under the Tort Claims Act, for damage assertedly caused by the judicial functioning of the court and its trustee in a reorganization proceeding under Chapter X of the Bankruptcy Act, was denied, the court saying, at page 277:

> We think the holdings are correct. The trustee, like a receiver, is an officer of court, appointed by the court, directed by the court, and paid by the court from the funds in the court. He is in no sense an agent or employee or officer of the United States. The judge is appointed by the President and confirmed by the Senate and paid from the United States treasury, but in trying cases he is a member of the independent judiciary and is not under

> the control of the United States any more than a member of the legislative department is in legislating. Such officers are not within the contemplation of the Tort Claims Act. If even gross errors of the judges are to be compensable out of the Treasury of the United States, very clear language would be required in a law so ordering.

To hold otherwise here would lead to the result that, through the judicial administration of the litigation of private parties, the United States would be liable to any losing litigant, or to any potential claimant in a bankruptcy proceeding such as petitioners here, merely because the court did not reach out on its own initiative and correct to the claimant's satisfaction all conceivable wrongs which could properly have been litigated before it.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

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SEPTEMBER 1959.

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[6] There is no substance to the claim that the decision below is in conflict with *Shelley* v. *Kraemer*, 334 U.S. 1. As correctly noted by the court below, that decision cannot be stretched to fit the situation here (Pet. 31).

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 354.

WALTER ALLEN et al.,
Petitioners.

v.

THE UNITED STATES,
Respondent.

PETITIONERS' REPLY BRIEF.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 354.

WALTER ALLEN et al.,
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v.

THE UNITED STATES,
Respondent.

PETITIONERS' REPLY BRIEF.

Petitioners' petition for Writ of Certiorari should not be denied for the reasons given by Respondent United States in its brief in opposition.

I.

Petitioners' claim does lie "against the United States" (Resp. brief, p. 5). 28 U. S. C. 1491, provides that:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1) Founded upon the Constitution; or

(2) Founded upon any Act of Congress; or

(3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages in cases not sounding in tort."

It is clear from petitioners "Argument" in connection with their "Petition for Writ of Certiorari" that petitioners claim comes well within (1), (2), (4), and (5) above. Certainly the Fifth and Fourteenth Amendments are involved, and as has been demonstrated, these amendments are complimentary to each other. They are in effect one and the same and they apply with equal force to the Federal Government as well as to the States.

Petitioners' money and wages, their liberty and property were taken by the Judicial Branch of our Government without due process of law and for the public use of operating a railroad. The public has gained and benefited by thousands of dollars that rightfully belong to petitioners.

Thousands of claims have been disposed of with money that belongs to petitioners. Such claims were settled, and reduced in bankruptcy and reorganization, as a result of a "judicial determination". The Constitution itself authorized enactment of a bankruptcy act by Congress, and the consequent impairment of contract obligations. But petitioners received less pay than their white co-workers doing the same job, and less, without the benefit of a "judicial determination". Indeed the Constitution does not authorize the discrimination.

The action does lie against the United States. It is founded on the Constitution. (Pet. for writ of certiorari, pages 2-3 and 10-11.) In Cohens v. Va., 6 Wheat. 264, 5 L. Ed. 257, Chief Justice Marshall in construing the

Judicial Article of the Constitution and the 25th Section of the Judiciary Act said:

> "A case in law or equity consists of the right of the one party, as well as the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either."

To like effect is Clapp v. U. S. (Ct. Claims 1954), 117 F. Supp. 576 and Christie Street Commission Co. v. U. S., 136 F. 326.

In In Compagnie General Transatlantique v. U. S. (Dist. Col.), 21 F. 2d 465, 466; Judge Augustus Hand, speaking for the court in construing the Tucker Act who jurisdictional language is identical to that of the Court of Claims (28 U. S. C. A. 1491), said:

> ". . . to limit the recovery in cases 'founded' upon a law of Congress to cases where the law provides in terms for a recovery would make that provision of the Tucker Act [same language as 28 U. S. C. A. 1491] almost entirely unavailable, because it would allow recovery only in cases where laws other than the Tucker Act already created a right of recovery. 'Founded' must therefore mean reasonably involving the application of a law of Congress . . ."

In Foster v. U. S. (Ct. Claims 1951), 98 F. Supp. 349, it is said, page 351:

> "The Supreme Court has recognized that claims 'founded upon the Constitution' may be sued upon, whether or not the circumstances also gave rise to a contract implied in fact."

In U. S. v. Causby, 328 U. S. 256, 267, 66 S. Ct. 1062, 1068, 90 L. Ed. 1206, the Supreme Court said:

> "We need not decide whether repeated trespasses might give rise to an implied contract . . . If there

is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine" (cases cited).

Respondent properly states that no claim is made that the provisions of the Classification Act of 1949 apply. 63 Stat. 954 (Resp. Brief p. 5). Of course not. This Act applies, as Respondent states, to the Executive Branch of Government, not to the Judicial Branch. But since Respondent brings it up, what does its Section 101 (1) [63 Stat. 954] and its Section 1103 [63 Stat. 972] say?

Section 101 provides:

> "(1) In determining the rate of basic compensation which an officer or employee shall receive, (A) The principle of equal pay for substantially equal work shall be followed, . . ."

Section 1103 provides:

> "In the administration of this act, there shall be no discrimination with respect to any person, or with respect to the position held by any person, on account of sex, marital status, race, creed or color."

Surely it cannot be that this standard of equality and non-discrimination applies only to the Executive Branch and not to the Judicial Branch also!

II.

In some attempt to absolve the Judicial Branch of Government from responsibility for wage discrimination, Respondent argues that petitioners do not "allege that the trustee or the Court even knew of the practices" (Resp. Brief, p. 6). The petition, however, is clear on this point (Record, p. 5, 10-11, par. 11-21-24). There can be no real

contention that the trustee and the Court was unaware of the discrimination.

It is shocking to read that both the Respondent (Resp. Brief, p. 7) and the Court of Claims (Record, p. 125) speak in terms of what some other Court might possibly have done. The fact is that such other Court did nothing to correct the discrimination. It is prayed that this Court will. It is shocking to think that returning the Missouri Pacific Railroad to its "Reorganized" new ownership (Resp. Brief, p. 7 footnote) was more important than correcting petitioners' wage discriminations.

Respondent states (Resp. Brief, p. 7 footnote) that the applicant himself (one of the petitioners Cassie S. Pennington in Pennington v. Missouri Pacific Railroad Company, 239 F. 2d 332) as well as the Eighth Circuit regarded the claim as one against the railroad. This is not true. There is no claim against the railroad as such. It violates no law for private persons to discriminate in wages for equal work. It was only because the Mo.-Pac. Railroad was being operated by the Judicial Branch of Government that gave rise to any claim. No Branch of Government may discriminate in wages because of color.

The Eighth Circuit in its opinion did not regard the claim as one against the railroad. Its decision simply said that the refusal to permit intervention was not an abuse of discretion and that petitioner is "entirely free to litigate his claim directly against the party he charges with liability in any Court of competent jurisdiction." This petitioners have done, choosing to sue the United States in the Court of Claims. For reasons above stated, they have no claim against anyone else.

The Respondent's further argument "That although a Bankruptcy Court has control of a corporate debtor's estate for a time, the ownership of the corporate entity

and its assets remain in private hands;" and "this was plainly not so during the Government's operation of the railroads in and after World War I" (Resp. brief, p. 8), is not completely true. A comparison of the manner of operation of the railroad by the Executive Department from 1918 to 1921 and the Judicial Department from 1933 to 1956 will so reveal. In both cases there was a complete operation by some branch of the Government. The United States did not "own" the railroads between 1918 and 1921. It had merely "possession and control" (Petition for Certiorari, p. 17).

In the 1918-1921 taking, regular dividends continued to be paid to stockholders and the Board of Directors continued the operation of the railroad "in the usual and ordinary course." 40 Stat. 1734-5. In the 1933-56 taking, no dividends of any kind were paid stockholders and the Board of Directors had no authority of any kind. Only the court and the trustee had any authority.

Respondent relies on Northern Pacific Railway Co. v. North Dakota, 250 U. S. 135 (Resp. Brief, p. 8 footnote). That suit was one to determine if United States control of the railroad prevented a state from fixing rates. It was in this connection that the portion of the decision quoted by Respondent was made. But cannot those same words apply with equal force to describe the possession and control of the Judicial Department of Government of the Missouri Pacific Railroad from 1933 to 1956. Such Judicial control was even greater than the Executive control. This Respondent admits (Resp. brief, p. 7).

At page 150 in the Northern Pacific case the Court said:

> "The elementary principle that under the Constitution the authority of the Government of the United States is paramount when exerted as to subjects con-

cerning which it has the power to control is indisputable."

Cannot these words apply with equal force as to the Judicial Department? What is ". . . authority of the Government of the United States . . ."? Does it not include the authority of the Judicial Branch of Government ". . . when exerted as to subjects concerning which it has power to control . . ."? Of course it does. The Constitution provides for uniform bankruptcy acts. Pursuant thereto Congress enacted such an act and pursuant thereto the Judicial Department operated the Missouri Pacific Railroad for twenty-three years. Petitioners have demonstrated that the bankruptcy act is subject to the Fifth Amendment (Pet. for cert., p. 14 footnote).

Respondent relies also on Missouri Pacific Railroad Co. et al. v. Ault (1921), 256 U. S. 554 (Resp. brief, p. 8 footnote). It states that the crux of this case (Mo. Pac. R. R. Co. v. Ault), is that by Section 10 of the Federal Control Act, Congress waived sovereign immunity and assumed liability for wages payable to employees of the railroads under government control (Resp. brief, p. 8 footnote). Perhaps this was true in that particular type of governmental operation (by Executive Department). But this "waiver" is not necessary for petitioners in the present case, because the discrimination against petitioners because of their color is contrary to the Fifth Amendment of the Constitution. The sovereign immunity to suit in such cases is already waived by the United States in the establishment of the Court of Claims.

Section 10 of the Federal Control Act, 40 Stat. 451, however, establishes beyond doubt that railroads are instrumentalities and agencies of the government. Section 10 provides in part that:

". . . and in any action at law or suits in equity against the carrier, no defense shall be made thereto

upon the ground that the carrier is an instrumentality or agency of the Federal Government . . .

This section was quoted and relied on by the Court in Missouri Pacific Railroad Co. v. Ault. That Congress herein recognized that a Railroad is an agency and instrumentality of government is clear and apparent, otherwise Congress would not have deemed it necessary to withdraw this defense from the railroad by the Federal Control Act. There would have been no necessity to do so. In the above case the court in construing Section 10, said:

(p. 559) "The plain purpose of the above provision (§ 10) was to preserve to the general public the rights and remedies against common carrier which it enjoyed at the time the railroads were taken over by the President . . ."

In any suit against the railroad, after the Missouri Pacific came under the control of the Executive Department of Government, it might well have defended itself successfully on the ground that it is an agency and instrumentality of the government. Recognizing this to be true, Congress withdrew this defense from the Missouri Pacific, by this section. No agency or instrumentality of government may discriminate in wages because of color.

III.

Cromelin v. U. S., 177 F. 2d 275 (6th. 1949), is not the law that applies to this case.

A complete reading of this case, relied on by the Respondent (Resp. brief, p. 9), will suffice to show it does not apply to these petitioners. Petitioners' claim and theory of liability is clearly set out in their petition for Certiorari. Certainly it does not sound in tort and is not based on the Federal Tort Claims Act. Among other

things Cromelin operated a private corporation. A railroad is never a completely private corporation. At most it is only quasi-private. That a Railroad is a public utility, affected with a public interest is beyond dispute. It has many of the attributes and powers of an agency of the Government, such as the power of Eminent Domain. It enjoys a monopolistic position and is protected against competition, except under special conditions prescribed by public authority. It is subject to extensive regulations by both the States and the Federal Government. In it exists a National Public Interest. In re American States Public Service Co. (D. C. Md. 1935), 12 F. Supp. 667, 698.

The public interest in rail transportation and railroads generally has been so great that by special acts of Congress large grants of land have been given them to help in their building and bonds have been sold to help finance them. The Missouri Pacific Railroad is one such land grant railroad, and is an important link in our transportation system. The Supreme Court has declared in Canadian Southern R. Co. v. Gebbard (N. Y. 1883), 109 U. S. 527, 538:

> "That business affected the public interest, and the keeping of the Railway open for traffic was of the utmost importance to the people of the Dominion." Could the Supreme Court say less for the Missouri Pacific Railroad between 1933 and 1956? Certainly not.

In Talcott v. Pine Grove (Mich. 1872), 23 Fed. cases 652 (aff'd 86 U. S. 666), in passing on the validity of municipal bonds for aid in building a railroad the court said that "a railroad corporation in view of its origin, objects, uses and the control of government over it, is a public corporation, though its shares may be owned by private individuals. It is a governmental agency for public purposes."

Nixon v. Condon et al., 286 U. S. 72, is a case in which a Texas Statute prescribed the qualifications of members of political parties. Therein Mr. Justice Cardozo speaking for the court said (l. c. 88):

> "The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly."

The court-appointed Trustee in this case was acting in "matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly." Through the Bankruptcy Act, the government makes its facilities available to any insolvent railroad which desires to effect a plan of reorganization, to which governmental facilities the Missouri Pacific Railroad submitted itself. These governmental facilities are a governmental function—not a business function. The court-appointed Trustee was a part of these governmental facilities. He was bound by "the mandates of equality and liberty that bind officials everywhere."

There can be no escape from the conclusion that the action of the Judicial Department of our Government in

respect to the Missouri Pacific Railroad from 1933 to 1956 constituted governmental operation of the Railroad by the Judicial Branch of Government. Under the law the trustee and the Court should have equalized the pay of petitioners with that of the white trainmen.

For all of these reasons as well as those in the petition for certiorari, it is respectfully prayed that petitioners' petition for Writ of Certiorari be granted.

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